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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTORINO ARZATE FLORES,

Defendant and Appellant.

E039666

(Super.Ct.No. FVA023452)

OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis,
Judge. Affirmed in part; modified in part; reversed in part.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, and Ronald A. Jakob and
Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Victorino Arzate Flores contends (1) the trial court erred in denying his *Wheeler/Batson*¹ motion; (2) the evidence was insufficient to sustain his convictions for animal cruelty in counts 17 and 18; (3) the trial court erred in instructing the jury that the animal cruelty counts were the natural and probable consequences of the home invasion robbery, residential burglary, grand theft dog, and conspiracy of which he was convicted in other counts; (4) the trial court erred under Penal Code² section 654 in imposing a consecutive sentence for count 3; and (5) the abstract of judgment should be corrected to reflect the proper subordinate terms on counts 14 and 15. In a supplemental brief, defendant contends the imposition of aggravated terms for counts 1, 14, and 15 violated his constitutional rights to trial by jury and proof beyond a reasonable doubt.

The People concede that defendant's convictions of grand theft dog in counts 3-12 must be reversed because they were based on the same conduct as defendant's robbery conviction and that defendant's sentence on counts 14 and 15 must be modified under section 1170.1, subdivision (a). We find no other errors.

II. FACTS AND PROCEDURAL BACKGROUND

Eileen Sparks, born on May 16, 1924, is a breeder for American Kennel Club (AKC) registered Yorkshire terriers. She valued her puppies at \$2,000 to \$3,000 and

¹ From *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), disapproved on another ground in *Johnson v. California* (2005) 545 U.S. 162, and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

² All further statutory references are to the Penal Code unless otherwise specified.

adult females at \$3,000 to \$5,000. In December 2004, she had three adult females and 10 puppies at her home in Fontana.

Before Christmas, defendant twice went to Sparks's home with other people to see her puppies. On December 26, two strangers came to Sparks's home and asked to see the puppies. She was scared because they had not telephoned in advance. She told them the puppies had been sold, and they left.

Defendant and a couple (later identified as Isabel Suarez and Marisol Lara) with a baby arrived and asked to see the puppies. After Sparks let them in, someone knocked at the door. When she answered the knock, she saw that it was the two strangers (later identified as Jose Novoa and Santiago Nunez) who had come to her home earlier that day. One of the men put a silver gun through the door and ordered, "Back up. Don't make any noise or I'll shoot you." The men said they were taking the puppies, and they went toward the kitchen.

Sparks tried to run into the garage. The man with the gun shoved her, and she fell over a chair. She started to get up, but the man pushed her and told her to get on the floor. When she complied, she hit her elbow on the floor. She continued to have pain in her elbow at the time of trial.

The man with the gun then said, "Get all of the puppies." The gunman pulled the phone and the security system box out of the wall, and the two men left with the dogs.

Sparks called 911. Two adult female dogs and eight puppies (two of which were seven weeks old) were gone, along with their dog beds and AKC papers.

Detective John Walker of the San Bernardino Sheriff's Department responded to Sparks's 911 call. Defendant, Suarez, Lara, and the baby were still at Sparks's house when he arrived. Detective Walker interviewed Sparks, defendant, Suarez, and Lara; Detective Walker then believed defendant, Suarez, and Lara were eyewitnesses, not suspects.

In the next few days, Sparks received four or five telephone calls in which she was told that she could have her dogs back for \$3,000. Four days after the theft, the police recovered the adult female dogs and seven puppies. The eighth puppy (one of the seven-week-old puppies) had died. Sparks testified that before the puppies were stolen, they had been fat and healthy, but when they were returned, they were dirty and sick. The other seven-week-old puppy was near death when returned, but Sparks was able to nurse it back to health.

Sparks testified that Yorkshire terrier puppies must feed from their mothers for five to seven weeks and then must be fed mushy food until they are about 10 weeks old. They are unable to eat dry food until their back teeth come through, at about 10 weeks of age. Sparks testified that a seven-week-old Yorkshire terrier puppy would not be able to eat or get nourishment from anything other than soft food.

The two 7-week-old puppies could not yet chew dry food, and Sparks had fed them raw beef, goat milk, and cottage cheese.

Both the male puppy that died and the female puppy that had been returned ill had weighed less than one pound. Sparks testified that when the female puppy was brought back in her cage, "she was lying on the floor all over pee, and she couldn't even get up. I

had to tube feed her some milk right down into her stomach because she was dehydrated”

Deputy Michael Martinez translated interviews of Novoa, Suarez, and defendant. Novoa said he and Santiago Nunez had driven defendant’s car to Sparks’s house while defendant, Suarez, and Lara drove in another car. Novoa and Nunez waited outside while the others entered Sparks’s house. Novoa and Nunez then entered the house, and Nunez pulled out a gun, pointed it at everyone, and asked Novoa to take the dogs. Novoa and Nunez took the dogs to Jorge Gomez’s house in Los Angeles, and defendant paid Novoa \$500.

Deputy Martinez testified that Suarez said he, defendant, and two others had gone to Sparks’s house and looked at the dogs a few days before the robbery. On the day of the robbery, defendant contacted Suarez and suggested they steal the dogs. Suarez, Lara, and defendant went into Sparks’s house and told her they were there to make a deposit on a dog. Once they were inside, the other two men entered. One of the men had a gun, and he ordered everyone to get on the floor. The two men left with the dogs. When the police arrived, Suarez pretended to be a victim.

The group later met at Gomez’s house. Defendant paid the other two men \$1,500 each but said he did not have enough money to pay Suarez. Instead, defendant offered Suarez a vehicle. Suarez was upset because he did not get the money he wanted; he called Sparks and offered to tell her where the dogs were for \$3,000. Suarez took Deputy Martinez to Gomez’s house, where the dogs were recovered.

When the officers were at Gomez's house, Gomez identified defendant, who happened to be walking by. Defendant was taken to the sheriff's department and interviewed. Defendant told Deputy Martinez that Gomez had offered to pay defendant to steal the dogs. The night before the robbery, defendant enlisted Nunez and Novoa to help, and defendant gave Nunez the gun to use in the robbery. Gomez gave him \$2,000, some jewelry, and the pink slips for two vehicles for stealing the dogs. Defendant told Deputy Martinez that the gun used in the robbery was at defendant's house. The officers recovered a .25-caliber silver and black gun at defendant's house.

Nunez had given another deputy a version of the events generally consistent with Novoa's version.

A geriatric physician testified that any fall by an elderly person posed a risk of great bodily harm, such as a major fracture, and psychological stress in a person over the age of 80 could precipitate a heart attack.

The jury found defendant guilty of home invasion robbery (§ 211 – count 1); first degree burglary (§ 459 – count 2); grand theft dog (§ 487e – counts 3-12); theft from elder (§ 368, subd. (d) – count 13); false imprisonment of elder (§ 368, subd. (f) – count 14); elder abuse (§ 368, subd. (b)(1) – count 15); conspiracy to commit a crime (§ 182, subd. (a)(1) – count 16); and cruelty to animal (§ 597, subd. (b) – counts 17 and 18)). As to counts 1 and 2, the jury found true age enhancements under section 667.9, subdivision

(a). As to all counts, the jury found true principal armed enhancements under section 12202, subdivision (a)(1).³

The trial court sentenced defendant to a total term of 22 years 8 months in prison, as follows:

Count 1: The aggravated term of nine years, plus one year for the principal armed enhancement and one year for the age enhancement.

Counts 3, 17, and 18: A consecutive eight months (one-third the middle term) for each count, plus four months (one-third the middle term) for the principal armed enhancement as to each count.

Counts 14 and 15: A consecutive aggravated term of four years for each count, plus four months (one-third the middle term) for the principal armed enhancements as to each count.

Counts 2, 4-13, and 16: Sentences stayed pursuant to section 654.

Other facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. *Wheeler/Batson* Motion

During voir dire, defendant's attorney brought a *Wheeler/Batson* motion after the prosecutor exercised a peremptory challenge to excuse a prospective African-American

³ Nunez, Novoa, and Suarez were named as codefendants. Before trial, they each pleaded guilty to home invasion robbery (§ 211), grand theft from an elder (§ 368, subd. (d)), elder abuse (§ 368, subd. (b)(1)), and cruelty to an animal (§ 597, subd. (b)).

juror. The trial court concluded a prima facie case had not been made and denied the motion. Defendant contends this was error.

1. Factual Background

Ms. R.,⁴ a widow, was a service attendant for Amtrak. She had two adult children. One was a licensed vocational nurse, and the other was incarcerated in California. She had no prior jury experience. The court inquired whether the fact of her son's incarceration would make her uncomfortable about serving as a juror, and she replied, "Not at this present time." She stated she had no friends or acquaintances in law enforcement, that she would be able to set aside her personal feelings and follow the law, and that she could be a good and fair juror. She stated that her son's case arose in San Bernardino County, and he had been prosecuted by the San Bernardino County District Attorney's office, but she did not hold any grudges or have any concerns about that. She stated she could be fair, but "If you had asked me ten years ago, I would have a problem." She stated she had felt differently at the time her son was prosecuted, but "[i]t all worked out for the better for [her] son." She still maintained a relationship with her son. She stated she was a dog owner, but the evidence about a dead puppy and the valuation of dogs would not cause her problems. She stated she could evaluate the testimony of an elderly witness by applying the same standards of credibility as to other

⁴ Defendant's opening brief sets forth the factual background concerning another juror, who apparently was not African-American, and argues error based on that factual background. In his reply brief, defendant argues error on the basis of the actual record as to Ms. R., and our discussion therefore responds to that argument.

witnesses. The fact that other witnesses might have been convicted or pled guilty did not cause her any concern in evaluating their testimony. She stated she could listen to the entire case and discuss it openly and honestly with the other jurors; she could follow the judge's instructions; she could base a verdict on circumstantial evidence; and she could return a verdict of guilty if the People proved the case beyond a reasonable doubt.

After the prosecutor exercised a peremptory challenge to excuse Ms. R., defense counsel made a *Wheeler/Batson* motion. Defense counsel argued that Ms. R. was the only African-American individual on the jury panel. Defense counsel further argued: "The facts are these: Of the first 15 jurors called to the box to be considered for sitting in this trial, one and only one [B]lack juror's name was called and he [*sic*] came to be questioned. They went through the initial questioning by the Court and then answered questions posed to them by myself, defense counsel, and by the prosecution. [¶] In my assessment of the answers given by [Ms. R.], I thought that she was very polite and sincere in dealing with both counsel and the Court. She was very forthcoming and open, and I think that there was nothing untoward about any of the answers she gave because she is the one and only [B]lack person that has been selected and I'm bringing my motion."

The prosecutor pointed out that Ms. R. was not the only African-American juror who had been called into the box; rather, the juror in seat No. 3 (Juror No. 11 at trial) was also African-American. The court agreed with that representation.⁵

The trial court found that defense counsel had failed to make a prima facie showing of *Wheeler/Batson* error. The trial court then asked the prosecutor to set forth on the record his reasons for excusing Ms. R. The prosecutor stated he did not make peremptory challenges on the basis of “race, creed, ethnic origin, national origin, gender, or any of the other cognizable factors that are addressed by *Wheeler* and the subsequent cases.” He repeated that, contrary to defense counsel’s representation, Ms. R. was not the only African-American juror on the panel. He then explained, “[Ms. R.] did indicate that her son, with whom she still has contact, was prosecuted approximately ten years ago for apparently a very serious matter for which he is still incarcerated in California. He was prosecuted by the same office that I work for and represent, the district attorney’s office in San Bernardino, which apparently also investigated and apprehended or brought to justice the sheriff’s department for this county which Detective Hatch . . . still works for and which numerous of our witnesses are employed by. [¶] On that basis, she did not appear to me to be an appropriate candidate for the trial on this case.” The trial court denied the *Wheeler/Batson* motion.

⁵ In his reply brief, defense counsel fails to acknowledge the trial court’s finding that Ms. R. was not the only African-American juror who had been called into the box, but instead repeated his contention that Ms. R. “was the only Black person that was selected.”

2. Analysis

The prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias, i.e., "bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds'--violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]" (*People v. Avila* (2006) 38 Cal.4th 491, 541 (*Avila*).)

In *Johnson v. California*, *supra*, 545 U.S. 162, the court reiterated the steps that guide trial courts' constitutional review of the prosecutor's use of peremptory strikes: "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Id.* at p. 168, fn. omitted.)

However, when the trial court determines that the defendant has failed to make a prima facie case of group bias, we resolve "the legal question whether the record supports an inference that the prosecutor excused [the prospective juror] on the basis of group bias." (*Avila*, *supra*, 38 Cal.4th at p. 555.) In *Avila*, one excused juror was the only African-American individual out of her group of 24 called to the box. She stated she had

“‘mixed feelings’” about her prior experience as a juror, and her brother had been arrested and convicted for manslaughter. She stated she believed her brother had been fairly treated, and nothing about his experience would affect her ability to be fair and impartial in the current case. The court held that this record disclosed “a number of ‘reasons other than racial bias for *any* prosecutor to challenge her’ [citation], including but not limited to her personal experience as a trial juror and experience with her brother’s involvement in the criminal justice system, notwithstanding [her] assurances that her prior experiences would not carry over to this case if she were chosen as a juror. [Citation.]” (*Id.* at pp. 554-555; see also *People v. Farnam* (2002) 28 Cal.4th 107, 138 (*Farnam*) [prospective juror’s “close relative’s adversary contact with the criminal justice system” was one ground upon which the prosecutor might reasonably have challenged prospective juror].)

The facts before us are substantially similar to those of *Avila, supra*, 38 Cal.4th 491, and *Farnam, supra*, 28 Cal.4th 107. We similarly conclude that the prosecutor might reasonably have excused Ms. R. on the basis of her son’s involvement with the criminal justice system, and the record does not support an inference that the prosecutor excused Ms. R. on the basis of her race. The trial court did not err in denying defendant’s *Wheeler/Batson* motion.

B. Sufficiency of Evidence

Defendant contends the evidence was insufficient to sustain his conviction of animal cruelty (§ 597, subd. (b))⁶ in counts 17 and 18.

1. Standard of Review

When we review a challenge to the sufficiency of the evidence to support a criminal conviction, we determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In doing so, we “view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citations.]” (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

⁶ Section 597, subdivision (b) provides in relevant part: “Except as otherwise provided in subdivision (a) or (c), every person who . . . deprives of necessary sustenance, drink, or shelter . . . or causes or procures any animal to be so . . . deprived of necessary sustenance, drink, [or] shelter, . . . and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter . . . is, for every such offense, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or a felony”

The trial court instructed the jury on the offense as follows: “In this case, in order to prove this crime, each of the following elements must be proved: [¶] 1. The person deprived an animal of necessary sustenance, or drink or shelter, or causes or procures [*sic*] any animal to be so deprived of necessary sustenance, drink or shelter; or [¶] The person has the charge or custody of any animal either as owner or otherwise; and [¶] 2. The person fails to provide the animal with proper[] food or drink or shelter or protection.”

2. Analysis

Defense counsel first argues that count 17 was based on the killing of the puppy that died, and count 18 was based on neglect of the same puppy. However, the evidence at trial and the argument to the jury was that one puppy had died and another had been near death when it was returned. Thus, it is apparent that counts 17 and 18 were based on the death of the first puppy and the near death of the second.

Defendant next contends that Sparks “was not questioned regarding the dog’s health, condition, or status, either before the theft of the dogs or after their return.” In fact, the record reflects otherwise, and defendant’s argument is therefore based on a mischaracterization of the evidence.

Sparks had 55 years of experience in breeding and raising dogs. She testified that all the dogs were in good health before they were taken. Both the puppy that died and the puppy that was returned near death had been seven weeks old. Sparks testified the two 7-week-old puppies required a special soft diet because they had been weaned, but their teeth were not yet sufficiently developed for them to eat dry food.

Sparks specifically testified that the puppy that died had been healthy and “fat for its size,” with a fat belly before it was taken. After viewing a photograph of the dead puppy, however, she testified that the puppy looked thin, as if it had not been eating or drinking. She repeated that the puppy had been healthy before it was taken. She stated her opinion that none of the puppies had had any health problems, eating problems, or problems gaining weight before they were taken. She testified that she would expect a puppy to get much thinner if it were not fed properly for four days.

Defendant argues that although the death of the puppy constituted some evidence showing guilt, that evidence was insufficient without further factual testimony or expert opinion. In this case, Sparks's testimony was sufficient. Her lengthy experience as a dog breeder, her familiarity with the condition of the dogs before their taking and after their return, and her testimony about the seven-week-old puppies' special dietary requirements, were sufficient evidence to establish a reasonable inference that those puppies had been deprived of proper food during their captivity.

C. Jury Instructions

Defendant argues that the evidence was insufficient to support an instruction on derivative liability because it was not reasonably foreseeable that one of defendant's confederates would neglect or kill the puppies.

1. Factual Background

During the jury instruction conference, defense counsel objected to the trial court instructing the jury with CALJIC No. 3.02 [Principals – Liability for Natural and Probable Consequences] as to the animal cruelty offenses charged in counts 17 and 18. Counsel argued that the animal cruelty offenses occurred at different times and locations with different individuals after the target crimes in the other counts were “technically and legally concluded.” The trial court overruled the objection.

The trial court thereafter instructed the jury with the following modified version of CALJIC No. 3.02: “One who aids and abets in the commission of a crime or crimes is not only guilty of that crime or those crimes but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime or

crimes originally aided and abetted. [¶] In order to find the defendant guilty of the crimes charged in Counts 17 and 18, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crimes charged in Counts 1 through 13 and 16 were committed; [¶] 2. That the defendant aided and abetted those crimes; [¶] 3. That a co-principal in that crime committed the crimes charged in Counts 1 through 13 and Count 16; and [¶] 4. The crimes charged in Counts 17 and 18 were a natural and probable consequence of the commission of the crimes charged in Counts 1 through 13 and Count 16. [¶] In determining whether a consequence is ‘natural and probable’ you must apply an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected likely to have occurred. The issue is to be decided in light of all of the circumstances surrounding the incident. A ‘natural’ consequence is one that is within the normal range of outcomes that may reasonably be expected to occur if nothing unusual has intervened. ‘Probable’ means likely to happen.”

2. Analysis

Defendant contends that the instruction to the jury that defendant was liable for the natural and probable consequences of the home invasion robbery and other crimes was not supported by the evidence. He argues that his liability ceased after a place of temporary safety was reached and that the death of the puppy was an unforeseeable act perpetrated by a confederate.

Ample evidence supported the finding that defendant was the ringleader and coordinator of the target crimes of the home invasion robbery and theft of the dogs. Suarez, Nunez, and Novoa all stated that defendant had planned the theft of the dogs.

The prosecutor argued that defendant was liable for the nontarget offenses of the animal abuse counts under the “natural and probable consequences” doctrine. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262 (*Prettyman*.)

The court in *Prettyman* succinctly summarized the natural and probable consequences doctrine: “Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a ‘natural and probable consequence’ of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the ‘natural and probable consequences’ doctrine, the jury must find that, with knowledge of the perpetrator’s unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant’s confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a ‘natural and probable consequence’ of the target crime that the defendant assisted or encouraged.” (*Prettyman*, *supra*, 14 Cal.4th at p. 254.)

The trial court should instruct the jury on the natural and probable consequences doctrine “only when (1) the record contains substantial evidence that the defendant intended to encourage or assist a confederate in committing a target offense, and (2) the jury could reasonably find that the crime actually committed by the defendant’s confederate was a ‘natural and probable consequence’ of the specifically contemplated

target offense. If this test is not satisfied, the instruction should not be given, even if specifically requested.” (*Prettyman, supra*, 14 Cal.4th at p. 269.)

What is reasonably foreseeable as a natural and probable consequence of the target crime varies with the circumstances and usually is a factual determination for the jury. The “ultimate factual determination of the jury as to the liability of an aider and abettor is based . . . on an objective analysis of causation; i.e., whether the committed crime was the natural and probable consequence of the principal’s criminal act the aider and abettor knowingly encouraged or facilitated.” (*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1051.)

However, when the perpetrator committed a collateral offense from the target crime, the accomplice is not automatically held to be derivatively liable for that collateral offense unless it was found to be the natural and probable consequence of the act intentionally aided and abetted. (*People v. Jones* (1989) 207 Cal.App.3d 1090, 1096.)

Defendant argues it was not reasonably foreseeable that his confederate would fail to feed the stolen dogs properly. We disagree. As the evidence showed, the seven-week-old puppies required a special soft diet and were incapable of eating dry food. However, defendant, in orchestrating the home invasion robbery and theft of the dogs, failed to take any steps to ascertain the puppies’ special needs. It was thus reasonably foreseeable that those particularly vulnerable puppies would not be properly cared for, and the jury could reasonably so determine. We conclude the evidence supports a finding that neglect of the puppies was a natural and probable consequence of the target crimes, and the trial court did not err in instructing the jury with CALJIC No. 3.02.

D. Section 654

Defendant contends his sentence for count 3 violates section 654. The People concede error, but on another basis. In *People v. Ortega* (1998) 19 Cal.4th 686, disapproved on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228, the Supreme Court held that grand theft is a necessarily included offense of robbery and reaffirmed “the well-established rule that a defendant may not be convicted of both robbery and grand theft based on the same conduct. [Citations.]” (*People v. Ortega, supra*, 19 Cal.4th at p. 699.) The court rejected the argument that grand theft of an automobile was not a necessarily included offense of robbery because one may commit a robbery without taking an automobile. The court explained, “[G]rand theft is simply one of the two degrees of the general crime of theft, and . . . the theft of an automobile is simply one of the many forms of theft that constitute grand theft.” (*Id.* at p. 698.) The court held that “[w]hen a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals.” (*Id.* at p. 699, quoting *People v. Brito* (1991) 232 Cal.App.3d 316, 326, fn. 8.) In *People v. Ortega*, therefore, the court reversed the defendant’s conviction of grand theft of an automobile because the defendant was convicted of the robbery of the same victim, during which the defendant also took personal property from the victim. (*People v. Ortega, supra*, 19 Cal.4th at pp. 699-700.)

Here, as the People concede, defendant’s convictions of grand theft in counts 3-12 must be reversed because the theft of the dogs was based on the same conduct underlying

defendant's robbery conviction. (See *People v. Ortega*, *supra*, 19 Cal.4th at pp. 699-700.)

E. Sentences for Counts 14 and 15

Defendant contends that the sentences imposed for counts 14 and 15 were improper under section 1170.1, subdivision (a).⁷ The People concede error.

The trial court sentenced defendant to a consecutive four-year term each for counts 14 and 15. However, the middle term punishment prescribed for convictions of section 368 subdivisions (f) and (b)(1) as charged in counts 14 and 15 is three years. Thus, under section 1170.1, subdivision (a), the trial court should have sentenced defendant to one year four months (one-third the middle term) for each count. The judgment must therefore be modified to reflect the proper sentence and the abstract of judgment corrected accordingly.

⁷ Section 1170.1, subdivision (a) provides, "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, . . . and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

F. Aggravated Terms

Defendant contends the imposition of aggravated term sentences for counts 14 and 15 violated his rights under the Sixth and Fourteenth Amendments. However, because we have concluded that defendant's sentences for those counts must be modified to one-third the middle term pursuant to section 1170.1, subdivision (a), the issue is moot.

The trial court also imposed the aggravated term on count 1, and defendant contends that he was entitled to a jury determination of the facts on which the aggravated sentence was based. (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*).) On January 22, the Supreme Court issued its decision in *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856, 860, 166 L.Ed.2d 856] (*Cunningham*)), holding that the imposition of an upper term sentence under California's determinate sentencing law (DSL), based on a judge's factual findings, violates a defendant's federal constitutional right to a jury trial. Thus, the middle term is the maximum sentence a judge may impose under the DSL – without the benefit of facts reflected in the jury's verdict – that is, facts found true by the jury beyond a reasonable doubt – or admitted by the defendant.

We agree that the trial court erred under *Blakely* and *Cunningham* in imposing the aggravated term on count 1 because the jury did not find the underlying facts true beyond a reasonable doubt. However, we conclude that any reasonable jury would have found at least one of the aggravating factors beyond a reasonable doubt. (*Washington v. Recuenco* (2006) ____ U.S. ____ [126 S.Ct. 2546, 2553, 165 L.Ed.2d 466] [holding that error in failing to submit a sentencing factor to the jury is not structural error and is therefore

subject to harmless error analysis]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [holding that error in failing to properly instruct the jury on gang sentencing enhancements was harmless beyond a reasonable doubt].)

Here, in sentencing defendant, the trial court noted that the probation report listed five factors in aggravation: (1) the “[c]rime involved the threat of great bodily harm or acts disclosing a high degree of cruelty, viciousness and callousness”; (2) “[T]he crime involved an attempted or actual taking or damage of great monetary value”; (3) “The defendant took advantage of a position of trust or confidence and trust”; (4) “The defendant occupied a position of leadership in the crime, induced others to participate in the crime”; and (5) “The manner in which the crime was carried out indicates planning.” The trial court further noted that the probation report listed no factors in mitigation.

Overwhelming evidence supported the trial court’s finding that defendant occupied a position of leadership in the underlying conduct and induced the others to join. It was undisputed that the taking involved loss of great monetary value, and the manner of taking indisputably indicated planning. Finally, there were no factors in mitigation.

A single aggravating circumstance is sufficient to authorize the imposition of the upper term under state law. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Thus, a determination that a jury would have found at least one aggravating circumstance true beyond a reasonable doubt necessarily renders a *Blakely/Cunningham* error harmless beyond a reasonable doubt. (See *Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35] [failure to instruct on element of offense harmless beyond

reasonable doubt where element supported by uncontroverted evidence at trial].) We therefore affirm defendant's aggravated sentence on count 1.

IV. DISPOSITION

Defendant's convictions for counts 3 through 12 are reversed. The sentences for counts 14 and 15 shall be modified in accordance with this opinion, and the abstract of judgment shall be corrected accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

GAUT

J.

MILLER

J.